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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1949

No. 647

UNITED STATES OF AMERICA,
Petitioner,
vs.
EAST SIDE CANAL & IRRIGATION COMPANY and STEVINSON WATER DISTRICT,
Respondents.

On Petition for a Writ of Certiorari to the Court of Claims.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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Respondents oppose the Petition for a Writ of Certiorari in the above-entitled action on the grounds set forth herein:

I.

STATEMENT AS TO JURISDICTION, ETC.

The Petition adequately sets forth the date of the judgment, the opinions of the Court of Claims, the basis of jurisdiction, and the questions involved.

II.

EFFECT OF GRANTING WRITS IN UNITED STATES v. GERLACH LIVE STOCK COMPANY, ETC., NOS. 4-9, OCTOBER TERM, 1949.

The Petitioner claims that the writ should be granted because writs have heretofore been granted in *United States v. Gerlach Live Stock Company, etc.*, Nos. 4-9, October Term, 1949. Those cases, however, have already been argued and are now set down for reargument on March 28, 1950, and they will probably be decided before this Court passes on this application. If the judgments in those cases are affirmed, there would be no point in granting a writ in this case. If, on the other hand, the judgments in those cases should be reversed, it might be proper to grant the writ in this case. Petitioner has not attempted to reargue the questions involved in the *Gerlach* case, and we do not deem it necessary that we should do so, as those questions are fully argued orally and in the briefs in those cases.

III.

WATER IN QUESTION WAS NOT ABANDONED.

The correctness of the ruling of the Court of Claims that respondents had not abandoned the water as to which the Court of Claims in its judgment herein awarded compensation constitutes no basis for granting the writ here applied for.

The facts are that by appropriation, diversion and use, the East Side Canal & Irrigation Company had

become the owner of 245⅞ cubic feet of water per second of the San Joaquin River (R. p. 10). It was likewise the owner of a dam across the River and a canal for the diversion of this water (R. pp. 9-10).

The Canal Company operated at all times as a public utility subject to the control of the Railroad Commission of the State of California (R. pp. 7-8). During all of the times here involved the water of the San Joaquin River, which is here involved, was actually diverted from the River into the canal and, at large expense, the canal was kept in repair in order that the water might be carried down the canal and delivered to its consumers. In the ordinary course of events the water would have been carried through the canal and used for irrigation, but a third party, namely Merced Irrigation District, discharged into the canal at various points water from a different source which, according to the findings of the Court of Claims, forced the San Joaquin water out of the canal so as to permit the Merced Irrigation District water to flow down the canal and be beneficially used by the Canal Company. In other words, the Canal Company diverted the water with intent to use it and was only prevented from using it by having water from another source forced upon it and discharged into its canal, thus, according to the findings of the Court of Claims, forcing the San Joaquin River water out of the canal and substituting for it water from a different source.

It is under these facts that it is claimed that the Canal Company forfeited its water rights under a

statute which provides "when the party entitled to the use of water *fails* to beneficially use all or any part of the water claimed by him, for which a right of use is vested, for the purpose for which it was appropriated or adjudicated, for a period of three years, such unused water shall revert to the public and be regarded as unappropriated public water". There is no decision of the Courts of California construing this statute as holding that forfeiture would occur under such circumstances. Under those conditions the Court of Claims held that there was no forfeiture where the water would have been used in the past except for the interference with such use by the Merced Irrigation District, and that the Canal Company intended in the future to use it whenever the Merced Irrigation District ceased to interfere with such use. This was a reasonable interpretation of this piece of legislation. The word *failed* "is applicable only in case of neglect":

Rillito Canal Co. v. Schmidt, 89 Pac. 523, 525, 11 Ariz. 49;

Buffalo County v. Phelps County, 261 N.W. 360, 129 Neb. 268.

Where failure was due to death this is not a "failure" within the meaning of the law:

Muenster v. Tremont Nat. Bank, 49 S.W. 362, 363, 92 Tex. 402.

"Fails" implies delinquency as well as non-action:

Stallings v. Thomas, 18 S.W. 184, 55 Ark. 326.

"Fail" means negligence or refusal:

Walker v. Sheffield Steel Corporation, 27 S.W. (2d) 44, 48, 224 Mo. App. 849.

See also:

Worthington Pump & Machinery Co. v. City of Cudahy, 195 N.W. 717, 182 Wis. 8;

Chesapeake & Ohio R.R. Co. v. Com., 84 S.W. 566, 119 Ky. 519;

Howell v. Lamberson, 231 S.W. 872, 149 Ark. 183.

Petitioner claims that there is no decision of the Courts of California upholding the decision of the Court of Claims. This may be admitted because no case has ever been before the courts of California involving the facts involved in this case. A decision that mere storage without beneficial use is not in itself a beneficial use does not extend to the facts in this case where the Company diverted the water for beneficial use and was in the process of applying it to beneficial use at the time involved here and was interfered with. Nor did the *Turner*[1] case involve the facts here existing. In that case the Court determined that a certain amount of water was beneficially used and that the balance of the water was wasted, without use, out of the canal and into intersecting sloughs. There was no claim that the company carried the water in the canal with any intent to use it or that it would have used it if it had not been interfered with. The same is

[1] *Turner v. East Side Canal & Irrigation Co.*, 169 Cal. 652, 147 Pac. 579.

true in regard to the *Hawkins*[2] case, which was simply a case of lack of beneficial use.

In the case of a public service water company, water held as a reserve or emergency supply is applied to a beneficial purpose.

Duckworth v. Watsonville Water & Light Co., 158 Cal. 206, 210, 110 Pac. 927.

Such an appropriator is permitted to take an amount sufficient to meet a reasonably anticipated demand.

Lindblom v. Round Valley Water Co., 178 Cal. 450, 457, 173 Pac. 994.

When the demand is certain and represented by contractual obligations general customs of business prudence would require a reasonable reserve of water to ensure against the loss of a purely fortuitous supply. Water thus taken in good faith is put to beneficial use.

Tulare Dist. v. Lindsay-Strathmore Dist., 3 C. (2d) 489, 547, 45 P. (2d) 1041.

This is particularly true where the restraint of the water serves as a degree of protection against damage by flood and as a means of equalizing and stabilizing the flow and there is no conflict of equities between contesting users.

Meridian Ltd. v. San Francisco, 13 C. (2d) 424, 449, 90 P. (2d) 537.

We respectfully submit that it is not shown that the decision of the Court of Claims is contrary to any decision of the Courts of California or any Federal

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[2]*Smith v. Hawkins*, 110 Cal. 122, 42 Pac. 453.

Court, that the decision was just and that the case depends on extraordinary facts and does not present any important question of general interest; and that, therefore, the Writ should be denied.

Dated, San Francisco, California,
March 27, 1950.

Respectfully submitted,
EDWARD F. TREADWELL,
Attorney for Respondents.